STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Oakland)

AMELIA HOSEY,

Plaintiff-Appellee,

-vs-

CHANTAY STARGHILL BERRY,

Defendant-Appellant.

Supreme Court No: _____
C.A. No: 257709
L.C. No: 03-050311-NI

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SULLIVAN, WARD, ASHER & PATTON, P.C.

NOTICE OF FILING

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APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT CHANTAY STARGHILL BERRY

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STATEMENT OF ORDER APPEALED FROM

Defendant-Appellant, Chantay Starghill Berry seeks either peremptory reversal or leave to appeal from a written opinion of the Michigan Court of Appeals dated April 6, 2006 (see: Court of Appeals Opinion 4/6/06, attached hereto as EXHIBIT A). **Succinctly, the Court of Appeals held that Plaintiff satisfied her burden of production in responding to Defendant's Motion for Summary Disposition under MCR 2.116(C)(10) exclusively by proffering substantively inadmissible hearsay documents. (Id, p 4).**

At issue during the summary disposition and Court of Appeals proceedings was whether Plaintiff could demonstrate the existence of a serious impairment of an important body function suffered as a proximate cause of the motor vehicle collision between the parties. **In responding to Defendant's Motion for Summary Disposition, and to prove medical causation, Plaintiff submitted three different "physician's reports" consisting of the same pre-typed forms which were FILLED IN AND undisputably prepared for litigation. (Id).** The Court of Appeals held that while these forms constituted inadmissible hearsay documents, the Motion for Summary Disposition should have been denied because "the doctors' opinions would be admissible in the form of opinion testimony at trial" (Id, p 4). The Court of Appeals thus reversed the trial court's grant of summary disposition.

The April 6, 2006 Opinion of the Michigan Court of Appeals is palpably erroneous and violates the clear dictates of Maiden v Rozwood, 461 Mich 109, 123; 597 NW2d 817 (1999) that a nonmoving party may not exclusively rely upon inadmissible hearsay evidence to sustain its burden of production (under MCR 2.116(G)(4)) in responding to a motion for summary disposition. The erroneous nature of the Court of Appeals' decision is clear and requires peremptory reversal, if not leave to appeal.

STATEMENT OF ISSUE PRESENTED

I. DID THE MICHIGAN COURT OF APPEALS COMMIT CLEAR, REVERSIBLE ERROR IN HOLDING THAT THE PLAINTIFF'S EXCLUSIVE RELIANCE UPON INADMISSIBLE HEARSAY EVIDENCE SUFFICIENTLY SUSTAINED HER BURDEN OF PRODUCTION IN RESPONDING TO A MOTION FOR SUMMARY DISPOSITION?

Defendant-Appellant says "Yes."

Plaintiff-Appellee says "No.

The trial court said "Yes."

The Michigan Court of Appeals said "No."

STATEMENT OF FACTS

A. Procedural History

The following procedural history contains the limited set of facts that are relevant and dispositive to this appeal.

This case arises from an October 7, 2000 automobile accident between the parties. Plaintiff alleged that, as a result of the accident, she sustained various injuries to her back and neck.

At the conclusion of discovery, Defendant filed a Motion for Summary Disposition, contending that Plaintiff failed to demonstrate that she suffered a serious impairment of an important body function as a proximate cause of the accident. Defendant cited to medical records and other discovery substantiating that, on the date of the accident, Plaintiff suffered a cervical sprain and bruise to the chest which did not affect her ability to lead her normal life as a result of the accident (Defendant's Motion for Summary Disposition, Brief in Support, and supporting exhibits). **In response, Plaintiff submitted three pre-typed "physician's reports" that were prepared solely for purposes of this litigation and presented to the physicians by Plaintiff's counsel. As even acknowledged by the Michigan Court of Appeals, "Plaintiff cited to no medical records, affidavits, or deposition testimony linking her alleged injuries to the accident" in responding to the Motion for Summary Disposition (EXHIBIT A, p 2).**

On each of the three forms, the Plaintiff was diagnosed with lower back disc degeneration. In addition, next to the question "are symptoms and diagnosis a result of the accident," each of the three physicians checked "Yes." (Physician forms of Peter Bono, M.D., Arthur Powell, M.D. and Virender Mendiratta, attached hereto respectively as EXHIBITS B-D.

A hearing on Defendant's Motion for summary disposition was conducted on June 23, 2004. At that time, the trial court granted the motion and held that Plaintiff had failed to establish a medically identifiable condition that was an objectively manifested injury resulting from the accident (see: Tr 6/23/04, pp 10-13, attached hereto as EXHIBIT E). The trial court characterized the physician's reports as "written on pre-printed standardized forms." The trial court also noted that the physicians simply checked "yes" to respond to the question "are symptoms and diagnosis a result of the accident?" The trial court concluded that these pre-printed forms were insufficient to establish a "medically unidentifiable condition that is an objective manifestation of an injury that is a result of the accident." (Id, p 13).

By way of written order dated June 23, 2004, the trial court granted Defendant's Motion for Summary Disposition (see: EXHIBIT F).

Plaintiff filed a Motion for Reconsideration, attaching an unsworn affidavit from Dr. Powell. In this additional hearsay document, Dr. Powell stated that his physician's report was a medical record kept within his file within the normal course of business. The trial court subsequently denied Plaintiff's Motion by way of Opinion and Order dated August 11, 2004.

On appeal, the Michigan Court of Appeals reversed. The appellate court acknowledged that the physicians' reports constituted inadmissible hearsay (EXHIBIT A, p 2). The Court of Appeals also acknowledged that Plaintiff did not proffer any admissible evidence in responding to the motion (id). However, the Court concluded that because the opinions reflected in the reports would be admissible if proffered at trial in the form of sworn testimony, the reports would "suffice to support Plaintiff's response to Defendant's Motion for Summary Disposition." (Id).

B. Summary of Medical Treatment

The following summary is for background information only. The summary is not directly relevant to the narrow issues raised in this Application. While the medical records and depositions cited in this section were attached to the Defendant-Appellee's Brief filed with the Court of Appeals, they are not attached hereto. If necessary, Defendant can submit these records to the Supreme Court in a supplemental filing.

At the scene of the accident, Plaintiff refused medical care. [Plaintiff's dep, pp 15-16]. She did not present herself to William Beaumont Hospital until 7:18 p.m., approximately 12 hours after the accident. [Id, pp. 18-19; William Beaumont Hospital Patient Discharge Summary, dated October 7, 2000]. X-rays of Plaintiff's chest and C-spine taken at that time were negative. [Id]. There was no evidence of a fracture and the impression was merely "moderate degenerative changes at C5-C6 with narrowing of the disk space and anterior spurring." [Id].[1]

At the time of the accident, Plaintiff was employed as a dealer at Motor City casino, a position which requires her to stand a lot. [Plaintiff's dep, pp 9, 27]. She immediately returned to work following the accident.

Notably, on November 17, 1999, more than one year prior to the subject motor vehicle accident, Plaintiff had presented herself to Dr. Mendiratta with complaints of cramps in her back, neck and shoulder. [Note of K. Virender Mendiratta, M.D. dated November 17, 1999].

On October 24, 2000, after interviewing and examining Plaintiff for the purpose of an Early Assessment Evaluation for Allstate Insurance Company, Dr. Shlomo S. Mandel remarked:

---

[1] A degenerative change in the spine is osteoarthritis of the spine.

> In summary, based upon her clinical presentation, it does not appear that this patient has suffered a soft tissue sprain/strain to her neck as a result of the motor vehicle accident described. She continues to complain of ongoing pain and stiffness, and for this reason I would concur with her treating physician. She would benefit from a short course of physical therapy three times a week for four weeks. Overall, the patient's prognosis is good and I would anticipate in the absence of structural abnormality that she would make a full recovery.
>
> In the meantime, she is presently working and performing her normal activities of daily living. I see no absolute medical reason why she cannot continue to do so. I see no indication for household assistance.
>
> * * *
>
> [IME, dated October 25, 2000, pp. 6-7].

On November 21, 2000, during a reevaluation, Dr. Shlomo S. Mandel again remarked:

> In summary, it appears that Ms. Amelia Hosey has essentially recovered from the injuries of a recent motor vehicle accident. At this time, Ms. Hosey has good prognosis and there is no need for additional diagnostic testing or treatment. The patient may use over-the-counter anti-inflammatory medications or topical modalities at home as needed.
>
> I believe she will be able to return to her normal employment duties as scheduled without restriction. I believe she is able to perform her normal activities of daily living and there is no indication that she would be in need of household assistance.
>
> * * *
>
> [IME, dated November 22, 2000, pp. 5-6].

On January 16, 2001, an examination of Plaintiff's lumbosacral spine only revealed "Arthritis at the level of L5-S1." [Medical Report, dated January 19, 2001].

On October 4, 2001, Plaintiff presented herself to the Porretta Center for Orthopedic Surgery with complaints of knee pain. [Medical Report, dated October 4, 2001]. The medical report indicates that Plaintiff "has been healthy without injury or trauma." [Id].

There is a notable absence of medical records to support any evidence of treatment for eighteen months, from October of 2001 through March of 2003, at which time Plaintiff underwent an initial evaluation for physical rehabilitation. During the initial evaluation, Plaintiff indicated that she had developed low back pain while standing at work in June of 2002:

> SUBJECTIVE:
> This is a 47-year-old female who states that she was standing at work in 'approximately June of 2002,' when she noticed a sharp low back pain. She states she did not really injure her back. She denied any trauma or injury at the time of the onset of pain. She states that the pain did commence suddenly. Currently, she complains of right side low back pain, and right lateral thigh pain. She states her symptoms are constant, but fluctuate in intensity, and are aggravated by prolonged standing, walking, and supine lying. She also complains of intermittent numbness and tingling in the right lower extremity. She rates her current pain range from 4-10 on a scale of 0-10 (0 = no pain, 10 = worst pain).
>
> PMH: The patient admits to a history of low back pain secondary to a motor vehicle accident in 2001, for which she underwent a course of physical therapy with good benefit.
>
> * * *
>
> [TheraMatrix Initial Evaluation, dated March 11, 2003].

On March 12, 2003, an examination of Plaintiff's cervical, thoracic and lumbosacral spines, pelvis and ribs revealed no evidence of any tenderness, spasm or masses. Her cervical and lumbar range of motion was within normal limits and there was no spinal asymmetry. The differential diagnosis was lumbar arthritis, lumbar radiculopathy and lumbar disc degeneration. [Medical Report, dated March 12, 2003]. A MRI of Plaintiff's lumbar spine on March 13, 2003 revealed severe degenerative disk disease and degenerative facet changes at L5-S1 with evidence of mild canal stenosis and mild grade I retrolisthesis of L5 on S1. [MRI Report, dated March 13, 2003].

On March 21, 2003, an examination of Plaintiff's cervical, thoracic and lumbosacral spines, pelvis and ribs again revealed no evidence of any tenderness, spasm or masses. Her cervical and lumbar range of motion was within normal limits and there was no spinal asymmetry. [Medical Report, dated March 21, 2003].

On June 6, 2003, Plaintiff filed the instant negligence action against Defendant Chantay Starghill Berry.

Plaintiff underwent surgery for lumbar spinal stenosis, L5-S1 on June 12, 2003, two years and eight months after the accident. Her last day of employment prior to the surgery was June 9, 2003. [Leave of Absence, Leave Request Notification form]. Apart from a twenty-seven day period during which she took a personal leave of absence, Plaintiff continuously worked between the date of the accident in 2000 and the weekend prior to her surgery in 2003 without restrictions.[2]

In the Operative Report of June 12, 2003, Surgeon Peter Bono, D.O. indicated "This is a female who has had a history of a fall which resulted in progressively worsening low back pain and bilateral leg pain with the left being worse than the right." [Operative Report, dated June 12, 2003].

On July 1, 2003, nineteen days after her surgery, Dr. Bono indicated that Plaintiff could begin driving in two weeks. [Medical Report, dated July 1, 2003]. On September 16, 2003, Dr. Bono indicated that Plaintiff could return to work on October 6, 2003 with no restrictions. [Patient Disability Statement, dated September 16, 2003]. Plaintiff returned to work without restrictions on October 8, 2003. [Plaintiff's dep, pp 9, 26, 33].

[2] Plaintiff's personal leave of absence ended on November 27, 2000. Plaintiff incorrectly identifies this date as November 27, 2003.

On April 20, 2004, after interviewing and examining Plaintiff during an independent medical examination, Neurological Surgeon Phillip Friedman, M.D. remarked:

> Ms. Hosey's examination, at this time is not credible. There are inconsistent responses. Particularly her motor examination is inconsistent with her ability to stand and walk and inconsistent with the reasonably brisk and intact reflexes.
>
> * * *
>
> In addition, her examination is inconsistent in that I was able to extend her right and left leg to 90° in the sitting position, but she would not allow me to elevate it beyond 5 or 10° in the supine position.
>
> At this time, I am unable to validate her examination. There is an inconsistency with her inability to stand and walk during the examination and her ability to continue working as a dealer in a casino.
>
> * * *
>
> At this time, I see no contradiction to her continuing to work as a dealer in a casino. It is difficult for me to validate her subjective complaints of disability at this time based on my examination, which is not a credible examination.
>
> * * *
>
> [IME, dated April 20, 2004].

On May 24, 2004, after reviewing additional medical documentation pertaining to Plaintiff, Dr. Friedman remarked:

> Ms. Amelia Hosey's original independent medical evaluation was on April 20, 2004. I have had an opportunity to review additional medical documentation pertaining to Ms. Amelia Hosey.
>
> * * *
>
> **IMPRESSION AND DISCUSSION:**
> Ms. Hosey's imaging studies of her lumbar spine described primarily degenerative changes with sever degenerative disc disease, degenerative facet changes at L5-S1 with evidence of

mild canal stenosis, as well as a mild grade 1 retrolisthesis of L5 on S1. These are changes that developed as a result of the degenerative process. Almost certainly, they had been present prior to the motor vehicle accident. It is possible that the motor vehicle accident may have resulted in a temporary exacerbation of the symptoms, necessitating physical therapy in the fall of 2000 following her motor vehicle accident.

Since the condition appeared to improve and based on the history that was documented in the records of TheraMatrix of a sudden onset in June of 2002 while standing, this would represent a new exacerbation of symptoms related to an underlying degenerative condition. This history was also documented in the history obtained by Dr. Herkowitz when he provided a history of one-year duration of back and right leg pain, and this was also documented in Dr. Bono's records when he stated the back pain was onset one and a half years ago.

* * *

At this time, I do not believe that the operative intervention that she underwent in June of 2003 was casually related to her motor vehicle accident of October of 2000. Her surgery addressed primarily a degenerative condition, which became exacerbated in June of 2002and which would have been necessary even in absence of the motor vehicle accident.

* * *

[IME, dated May 24, 2004].

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY HELD THAT PLAINTIFF COULD RELY SOLELY UPON INADMISSIBLE HEARSAY TO SATISFY HER BURDEN OF PRODUCTION IN RESPONDING TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

A. Standard of Review

Defendant Chantay Starghill Berry sought and was granted summary disposition pursuant to MCR 2.116(C)(10) for lack of a genuine issue of material fact.

The trial court's decision to grant or to deny summary disposition is to be reviewed de novo on appeal. Altairi v Alhaj, 235 Mich App 626, 628; 599 NW2d 537 (1999).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999). "The trial court must consider the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party." Maiden, supra.

A trial court should consider the substantively admissible evidence actually proffered in opposition to the motion; however, a trial court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. id. A mere promise that the claim will be supported by evidence at trial is insufficient. id. The non-moving party must produce admissible evidence in response to the motion. Id, Veenstra v Washtenaw County Club, 466 Mich 155, 159; 645 NW2d 643 (2002). "[W]hen the proffered evidence fails to establish a genuine issue as to any material fact," the moving party is entitled to summary disposition as a matter of law. Maiden, supra.

B. MCL § 500.3135(1) Requires That Plaintiff Establish A "Serious Impairment Of Body Function" Arising From The Operation Of A Motor Vehicle

The Michigan no-fault act abolished tort liability with regard to the use of a motor vehicle, absent a statutory exception. MCL § 500.3135. To sustain a prima facie case for motor vehicle negligence under Michigan no-fault law to maintain an action for noneconomic damages, a plaintiff is required to establish that he or she suffered "serious impairment of body function" or "permanent serious disfigurement." MCL § 500.3135 sets forth these requirements and provides as follows:

> (1) A person remains subject to tort liability for noneconomic damages **caused by** his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement.
>
> MCL § 500.3135(1). [Emphasis added].

Serious impairment is defined as **"an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."** MCL § 500.3135(7) (emphasis added). Absent a factual dispute that is outcome determinative, a trial court is required to determine, as a matter of law, whether plaintiff has suffered serious impairment:

> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
>
> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injury.

> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person ahs suffered a serious impairment of body function or permanent serious disfigurement.

MCL § 500.3135(2).

The statutory definition of "serious impairment of body function" under MCL § 500.3135(7) contains three elements: First, there must be an objectively manifested impairment. Second, the objectively manifested impairment must be of an important body function. Third, the impairment must affect a person's general ability to lead his or her normal life. MCL § 500.3135.

In Kreiner v Fischer, 471 Mich 109; 683 NW2d 611 (2004), the Michigan Supreme Court recently clarified the standards to determine the existence of a statutory threshold injury and specifically looked to whether a plaintiff's impairments affect his or her general ability to lead his or her normal life.

The Michigan Supreme Court in Kreiner articulated a multi-step process to separate those plaintiffs who meet the statutory threshold of "serious impairment of body function" from those that do not:

> In order to be able to maintain an action for noneconomic tort damages under the no-fault act, the "objectively manifested impairment of an important body function" that the plaintiff has suffered must affect his "general ability" to lead his normal life.
>
> * * *
>
> First, a court must determine that there is no factual dispute concerning the nature and extend of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.
>
> * * *

> Second, if a court can decide the issues as a matter of law, it must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the impairment is on an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured, but not impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient.
>
> If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's general ability to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.
>
> Kreiner, supra at 130-133.

Thus, to meet the statutory threshold of "serious impairment of body function," the nature and extent of a plaintiff's injuries must be factually undisputed, these injuries must consist of an impaired important body function that is objectively manifested, and this objectively manifested impairment must affect the plaintiff's general ability to lead his or her normal life. id.

A plaintiff's general ability to lead her normal life has not been affected where the impairment has only interrupted some aspects of her entire normal life and despite these impingements; the course of plaintiff's normal life remains unaffected. id. at 131.

The Kreiner Court further set forth a nonexhaustive list of objective factors to evaluate whether a plaintiff's "general ability" to conduct the course of his or her normal life has been affected: (1) the nature and extent of impairment; (2) the type and length of treatment required; (3) the duration of the impairment; (4) the extent of any residual impairment; and (5) the prognosis for eventual recovery. id. at 133.

C. Plaintiff May Not Rely Solely Upon Hearsay Documents To Satisfy Her Burden Of Production Under MCR 2.116(G)(4).

In Craig v Oakwood Hospital, 471 Mich 67, 684 NW2d 296 (2004), the Michigan Supreme Court recently articulated the standard of proof demanded of a plaintiff in proving the existence of medical causation:. Craig reaffirmed the requirement that the claimant proffer admissible evidence to support his or her claim:

> It is important to bear in mind that **a plaintiff cannot satisfy this burden** by showing only that the **defendant may have caused his injuries**. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." **A valid theory of causation, therefore, must be based on facts in evidence.** And while "'the evidence need not negate all other possible causes,'" this Court has consistently required that the evidence "'exclude other reasonable hypotheses with a fair amount of certainty.'" (emphasis added; internal citations omitted).
>
> 471 Mich at 87-88. [Emphasis added].

The Michigan Supreme Court has explained the rationale for prohibiting the party responding to a motion for summary disposition from relying solely upon an inadmissible hearsay evidence:

> Demanding that evidence be substantively admissible is consistent with MCR 2.116(G)(4), which requires that an adverse party "set forth specific facts showing that there is a genuine issue for trial."

> By presenting inadmissible hearsay evidence, a nonmoving party is actually promising to create an issue for trial where the promise is incapable of being fulfilled. The nonmovant is not showing that a genuine issue exists. Permitting inadmissible evidence to suffice in opposing summary disposition would require less than the pre-1985 court rule and create illusory fact issues.
>
> Maiden v Rozwood, supra, 461 Mich at 123, fn 5.

In this context, MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802.

In turn, where medical records contain a contested hearsay statement, that statement must also be admissible under a hearsay exception unless it qualifies as nonhearsay. Merrow Bofferding, 458 Mich 617, 627; 581 NW2d 686 (1998), MRE 805.

A physician's report constitutes hearsay unless it falls into an exception or exclusion to the hearsay rules. People v Huyser, 221 Mich App 293, 297; 561 NW2d 481 (1997). MRE 803(6) provides that records regularly generated by a business in the course of its activities are not excluded by the hearsay rule unless the circumstances surrounding the preparation of the records indicate a lack of trustworthiness. Huyser, supra, 221 Mich App at 297, MRE 803(6). **However, "a record 'prepared for the purpose of litigation' lacks the trustworthiness that is the hallmark of a document properly admitted pursuant to MRE 803(6)." 221 Mich App at 297.**

Here, the Michigan Court of Appeals recognized that the preprinted forms utilized by Plaintiff's counsel's for the physicians' reports were prepared and executed for the purpose of litigation and therefore constituted inadmissible hearsay. The Court of Appeals acknowledged:

> There is no dispute that the physicians' reports in this case were completed for the purpose of litigation. Although Dr. Powell's "affidavit" indicates that his report was also "a medical record, kept within my file in the normal course of business," the "affidavit" was not notarized and, thus is not a valid affidavit. MCR 2.113(A). Further, the purported affidavit was submitted only on reconsideration and thus may not be considered by this Court when it is reviewing the trial court's summary disposition ruling. *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996). Finally, even if the affidavit was valid and subject to our review, the fact that Powell's report was "a medical record, kept within [his] file in the normal course of business," would not render it admissible under MRE 803(6). As noted above, MRE 803(6) provides an exception to records of regularly conducted activity "unless the circumstances of preparation indicate lack of trustworthiness." **In this case, it is undisputed that the physicians' reports were prepared for the purpose of litigation. Documents prepared for use in litigation lack trustworthiness and are not admissible under MRE 803(6). *Huyser, supra* at 297-298.**
>
> EXHIBIT A, p 4. [Emphasis added].

Nonetheless, the Court of Appeals concluded that because the doctors' opinions reflected in the reports could be admissible at trial if proffered in the form of sworn testimony, the hearsay reports would "suffice to support plaintiff's response to defendant's motion for summary disposition." Id. Remarkably, the Court of Appeals erroneously concluded:

> Nonetheless, plaintiff suggests that, pursuant to MCR 2.116(G)(6), the content of the physicians' reports, i.e., the doctors' opinions are admissible. We agree. Although the reports themselves are inadmissible, the doctors' opinion would be admissible in the form of opinion testimony at trial. To withstand a motion under MCR 2.116(C)(10), "[a]ffidavits, depositions, admissions, and documentary evidence. . . shall only be considered to extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6) (emphasis added). **Because the doctors' opinion testimony would be admissible at trial, their opinions, contained in the inadmissible reports, suffice to support plaintiff's response to defendant's motion for summary disposition. In their opinions, the doctors state that plaintiff's injuries were caused by the accident. Therefore, the trial court**

erred in granting summary disposition on the basis that there was no genuine issue of fact with regard to causation.

Id. [Emphasis added].

This passage of the Court of Appeals' opinion employs an erroneous standard which is unsupported by any caselaw authority and improperly accommodates "the mere possibility that the claim might be supported by evidence produced at trial." Maiden v Rozwood, 461 Mich at 121.

The Court of Appeals in this regard also erroneously cited to MCR 2.116(G)(6) as an exception to the general prohibition against reliance upon inadmissible evidence when responding to a motion for summary disposition. Veenstra v Washtenaw Country Club, supra, 466 Mich at 164. To the contrary, MCR 2.116(G)(6) allows for consideration of only admissible evidence during summary disposition proceedings. Maiden, supra; Veenstra, supra; Face Trading, Inc v Department of Consumer and Industrial Services, ___ Mich App ___ (Docket No. 256639, rel'd 4/18/06). This Court Rule does not support the Court of Appeals' opinion.

In sum, the Court of Appeals was obligated to affirm the grant of summary disposition in favor of Plaintiff when it determined that the only evidence proffered by Plaintiff in responding to the Motion for Summary Disposition constituted inadmissible hearsay. The Court of Appeals was not free to reverse the trial court's order premised upon the "possibility" that the physicians which signed the preprinted forms would provide sworn testimony at trial.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Chantay Starghill Berry respectfully requests that this Honorable Court either peremptorily reverse or grant leave to appeal from the Michigan Court of Appeals' opinion of April 6, 2006.

Respectfully submitted,

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